

GERTRUDE OSRIN v. RHOKANA CORPORATION LTD.

HIGH COURT CIVIL CAUSE NO. 10 OF 1939.

Running down action—damages—Lord Campbell's Act.

In this case the Court has set out the method of calculating what damages are payable under Lord Campbell's Act (Fatal Accidents Act, 1846) to the wife, husband, parent or child of a person whose death has been caused by the wrongful act of another person.

Robinson, J.: In this case the plaintiff is claiming damages from the defendants as a result of a motor accident in which her husband was killed on 14th November, 1938.

Damages were claimed under two heads:

- (a) £1,000 for personal injuries and shock;
- (b) £14,000 for the death of her husband, Alexander Osrin,

under Lord Campbell's Act (Fatal Accidents Act, 1846).

The defendants admitted liability and the amount paid into Court for personal injuries having been accepted, the only remaining question for the Court to decide is the proper amount of damages under Lord Campbell's Act.

It is best first to set out the essentials of such an action.

The Act gives the Executor or Administrator of any person whose death has been caused by the wrongful act, neglect or default of any other person, an action to recover damages in respect thereof, when the act is such as would (if death had not ensued) have entitled the party injured to sue. The action is to be for the benefit of the wife, husband, parent and child of the deceased. In assessing damages, the Court is confined to the pecuniary loss, or the loss of reasonable expectation of pecuniary benefit, sustained by the family, and cannot take into consideration the mental sufferings of the survivors. The damages must be measured by such portion of the income as the claimant or claimants may be inferred to have enjoyed. Nothing is to be deducted on account of monies being received from an insurance company on the death of the relative, but it is right, when investigating the income, that the premiums paid should not be taken into account. Funeral expenses and travelling and mourning expenses cannot be recovered.

In my opinion it is good law to say that the object in awarding damages to the dependants is to compensate them for material loss, not to improve their material prospects, and, in the assessing of such damages, due allowance must be made for such factors as the possibility of re-marriage of the widow or marriage of the daughters, the fact that children may become self-supporting and the fact that with advancing years the

earning capacity of the deceased would have been likely to diminish. The nature of the business or services providing the income must also be remembered.

When calculating damages under the Act, the question not only of the expectation of life of the deceased must be considered, but also the expectation of life of the claimant.

The Court has to find a reasonable compensation and it is impossible to find such a sum by any precise arithmetical rule. The damages awarded must be left to the sense of equity of the Judge and they should not be based upon the principle of an annuity. Nevertheless, in this Territory, where the Courts work without the assistance of a jury (who have a special genius in such matters) I think it is sound to test the general equities of each particular case against the result of actuarial calculation, and that is what I propose to do now.

The plaintiff, the widow of the deceased in this case, is the sole claimant. I will first fix an approximate figure for the average income earned by the deceased, secondly, decide the portion of that income enjoyed by the plaintiff and thirdly assess the damages.

Before going into the problem of the average yearly income I will make a few remarks. Generally from the evidence I have formed the opinion that the deceased Mr. Alexander Osrin was most probably a man of initiative and resource. He was ready to try new adventures; he had the plausibility to carry them through. If one business failed, he would try another. He was never without ready cash although the business was run on a large overdraft. His ordinary mode of living was very unpretentious, two rooms and a kitchen behind the shop, but yet he had a new motor car each year and I see no reason to disbelieve that he and his wife spent £500 in seven weeks on a holiday. With such contradictory characteristics, I intend to make no attempt to prognosticate what might have happened in the future, but to rely on what evidence there is as to his income prior to his death.

During the three years prior to the death in November, 1938, there were two main sources of income—a furniture business carried on at Ndola and Lusaka which was transferred to Luanshya on 1st September, 1936, and, on that date, a book-making business was also started with headquarters at the shop at Luanshya.

The deceased kept books but they do not reveal a complete picture of the state of his affairs. They show fairly accurately the position of the furnishing business, to which the books only really purport to relate. But they also show an excess of monies coming in, which have nothing to do with the furnishing, and those excess monies the plaintiff alleges relate to profits on the book-making business.

After Mr. Osrin's death, the plaintiff was left to wind up his affairs. She did not take legal advice and in evidence she stated that she did not know she could make a claim against the defendants. Therefore she destroyed her husband's book-maker's analysis book and great quantities of betting slips. However, I am quite satisfied that there was a betting business and that it made profits.

The plaintiff also alleges that besides the Drawings Account and the Private Account and the Post Office Savings Account, all of which I am sure relate to some extent to the book-making business, another profit flowing from the book-making is shown by the fact that prior to the 1st September, 1936, an average of £10 per month or so more was withdrawn from the furniture business for household expenses than after the racing business began. There is evidence to show that when cash bets were made, the deceased would put the money in his pocket and use it for cash payments, household or otherwise.

Mr. Paice, Chartered Accountant, was called as an expert witness on the books, for the plaintiff, and Mr. Fooks, Chartered Accountant for the defendants. They were both most helpful to the Court, as was the assistance of learned Counsel, Mr. Norman Price, K.C., for the plaintiff and Mr. Bertin, K.C., for the defendants. A number of extracts and analyses from the books were prepared and put in evidence, as were the books themselves. The data are there and I do not conceive that it is necessary for me laboriously to set out, analyse and assess each step towards coming to a conclusion of a fair annual income, taking an average of three years prior to the death. It is natural that the deductions and calculations of the two Chartered Accountants should differ and that they do not agree on the conclusions to be drawn from the one constant factor, the figures. I do not propose to enter into the controversy, but to find a fair approximate average figure having heard their evidence and studied the exhibits.

First as to the furniture business. I do not think it right entirely to ignore, as the defendants would have me do, the profits in the year ending 31st March, 1936, from the auction mart and contracting business. As I have said before, in my opinion the deceased was an astute business man and if he closed down those profit making side-lines, it was only to devote more of his energies to the furniture business. For the year ending 31st March, 1938, I am helped by Ex. H, an income tax assessment notice. I am not taking into active consideration either way the period from 1st April, 1938, to 14th November, 1938 (date of the death). I see no reason to suppose that it would not have been a very similar trading year to the previous three, had it been completed.

I find a fair average income from the furnishing business is £700 per annum. As to the betting business, in the income tax assessment notice (Ex. H) for the year ending 31st March, 1938, a profit of £408 is declared and upon which tax has been paid. Mr. Paice's figures (see Doc. G of Ex. C) shows surplus monies which he attributes to profits from the book-making business as follows:

(1) 1st September, 1936, to 31st March, 1937	...	£315	10	3
(2) 1st April, 1937, to 31st March, 1938	...	734	11	8
(3) 1st April, 1938, to 31st December, 1938	...	411	19	4
Average per annum	...	484	0	0

Mr. Fooks agreed that these monies were surplus in the books, but said he was not satisfied that they were all attributable to racing profits. The defendants therefore relied on the figure of £408 in the income tax assessment.

I find a fair average income from the book-making business is £450. The total average income therefore which the plaintiff and deceased enjoyed and might well have continued to enjoy, is £1,150 per annum.

From that must be deducted £118 being the insurance premiums which leaves £1,032 per annum.

I must now decide what proportion of that income was enjoyed by the wife (plaintiff) and Mr. Price for the plaintiff suggested 60 per cent., Mr. Bertin in his final address 40 or 50 per cent. There was no evidence except a statement by the plaintiff that she thought she enjoyed about 60 per cent. of deceased's income. They lived together, went on long holidays together, but she spent more on clothes than he did and she also went on short holidays alone. The evidence is very meagre. The family consisted only of husband and wife living together. There were no special circumstances and I find the wife enjoyed 50 per cent. of the husband's income, and when fixing that figure I have borne in mind that although she may have actually spent more of it I think, on the evidence, she gave some small services towards earning it.

The figure of average annual income upon which damages must be measured stands now, therefore, at £516.

At the date of death the deceased was 43 years old and the plaintiff 33 years and it was admitted that the expectation of life of the deceased on 14th November, 1938, was 24.51 years and, on the same date, the expectation of life of the plaintiff was 30.28 years. An actuarial calculation based on such expectation of life, according to the tables, shows that on the joint lives to buy an annuity of £1 would cost £11.4, therefore to buy an annuity of £516 would cost, say, £5,882.

That figure, however, does not take into consideration a sum of £1,334 already received by the plaintiff as heir to the estate, the possibility of remarriage of the widow or the fact that with advancing years the earning capacity of the deceased would have been likely to diminish or the fact that part of the income was earned from book-making, which could be termed a risky business.

Bearing all these circumstances in mind and remembering that the circumstances of each case must be judged as a whole on its equities, I assess as fair compensation the sum of £4,000.

I give judgment for £4,000 and costs. Costs to be taxed.